No. 12036

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT COURT

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the Supreme Court for the Territory of Hawaii

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INTRODUCTION

In view of the fact that appellee has seen fit to label our appeal as frivolous[1] it is deemed imperative to submit herewith a brief in reply, which can be outlined as follows:

[1] Appellee's Brief, P. 3.

I. This appeal is not frivolous.

II. Appellant cannot accept appellee's statement of the case.

A. The military reservation in question is not within the Territory of Hawaii, jurisdictionally speaking.

B. There is more than a single factual difference between this and the *Yerian* case.

C. The fact that appellant lives and works on a military reservation is material.

III. The Territory of Hawaii does not have the power to impose the tax in question on this particular appellant.

A. The federal statutes[2] do not grant this power.

B. The power of the Territory to impose the tax in question does not exist "even in the absence of such statutes."

I.

THIS APPEAL IS NOT FRIVOLOUS.

There are so many income tax aspects to a simple statement of facts that the questions involving the taxation of incomes cannot be considered lightly nor an appeal frivolous. The subject of taxation itself is a very broad field and cannot be treated lightly. The very foundations of the United States rest upon it. It was the principle of "no taxation without representation" that was the decided stimulus toward the formation of the union and the struggle for independence among the several colonies. Its importance has not diminished today. The Supreme Court of

[2] Public Salary Tax Act of 1939, and the Buck Act.

the United States has repeatedly granted certiorari in taxation cases for the reasons stated so aptly by Mr. Justice Frankfurter:

> "... Wise tax policy is one thing; constitutional prohibition quite another. The task for devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statement. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations."
>
> *Newark Fire Insurance Co. v. State Board of Tax Appeals,* 307 U.S. 313, 324, 83 L. E. 1312, 59 S. Ct. 918 (1938).

The very strict rule relative to appeals, that has been frequently cited that:

> "An appeal will not be dismissed, on motion, on the ground that it is frivolous or for delay."
>
> *Amory v. Amory,* 91 U.S. 356, 23 L. Ed. 436.

has been modified somewhat by later decisions, but the recognized tendency is contained in the following:

> "Appeals are favored by law and an appeal will not be regarded as 'frivolous' unless it clearly appears that appellant's counsel does not honestly believe that there is merit in his contentions and that the proceeding was taken merely for purposes of delay."
>
> *J. J. Clarke Co. v. Toye Bros. Yellow Cab Co.,* 22 So. (2d) 298, 300, 301 (La.).

In this connection also it is worthy of note that appellee entered an answering brief of some 26 pages of print, involving considerable research with 43 citations, so it must

be apparent on the face that appellee does not actually consider the appeal frivolous.

> "If an argument is required to show that the pleading is bad, it is not frivolous."
>
> *Macarone v. Hayes,* 82 N.Y.S. 1005, 1008, 85 App. Div. 41, citing *Youngs v. Kent,* 46 N.Y. 672.

> "A 'frivolous pleading' is one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the pleadings, that its character may be determined without argument or research; and a pleading is not frivolous if a defense can be spelled out from it, or any part of it."
>
> *Germain v. Harwell,* 66 So. 396, 398; 108 Miss. 396.
> *Nolen v. State,* 150 P. 149, 150; 48 Okl. 594.

II.

APPELLANT CANNOT ACCEPT APPELLEE'S STATEMENT OF THE CASE.

A. THE MILITARY RESERVATION IN QUESTION IS NOT WITHIN THE TERRITORY OF HAWAII, JURISDICTIONALLY SPEAKING.

Such part of appellee's statement of the case that implies that the military reservation in question is "within"[3] the Territory of Hawaii is not acceptable to appellant in that it is not a part of the agreed statement of facts and raises

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[3] This question is actually posed by the definition set forth in the Compensation and Dividends Tax Act itself:

" 'Compensation' shall mean and include commissions, fees, wages, salaries, bonuses and every and all other kinds of compensation paid for or attributable to *personal services performed within the Territory . . .* " (Emphasis added. Sec. 5342, Revised Laws Hawaii, 1945.)

the very ultimate question which this court is being requested to determine:

> "Appellee agrees with appellant's statement of the case, *but supplements it* by stating that the tax in question was imposed upon the gross compensation received by the appellant during the period October 1944 to September 1946, for services performed as an employee of the United States in a military reservation *within the exterior boundaries of the Territory of Hawaii.*"
>
> (Underlining added—Appellee's Brief, p. 2.)

The references by appellee in its statement of the case[4] to the reservation being "within" the Territory sidestep the issue herein.

The question is not whether the military reservation is part of the Territory of Hawaii, geographically speaking —but whether it is within the jurisdiction of the Territory, and more particularly, whether this taxpayer, on the facts given, is within its taxing jurisdiction.

B. THERE IS MORE THAN A SINGLE FACTUAL DIFFERENCE BETWEEN THIS AND THE *YERIAN* CASE.

This case is distinguishable from the *Yerian*[5] case in the following material respects:

1. In the instant case appellant lives and works on a military reservation.

   (Agreed statement of facts 1 and 4. T-12.)

   (Yerian did neither.)

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[4] Appellee's Brief, P. 2, 3.
[5] 130 F. (2d) 786.

2. Domiciled in and a citizen of the State of Colorado, appellant has paid a net income tax to the State of Colorado on the same income sought to be taxed herein by the Territory of Hawaii (Agreed statement of facts, 6, T-13), and hence a question of triple taxation is involved.

3. Yerian maintained a residence in the Territory of Hawaii.[6]

C. THE FACT THAT APPELLANT LIVES AND WORKS ON A MILITARY RESERVATION IS MATERIAL.

Appellant respectfully begs to differ with appellee on the question of the materiality of appellant living and working on a military reservation.

That distinguishing factor is the very fulcrum of this case insofar as the question of jurisdiction is involved.

It is that factor which must of necessity require the Territory to affirmative establish that it has jurisdiction over appellant.

Even appellee agrees that

> "Of course the Territory agrees that jurisdiction to tax is essential," (Appellee's Brief, p. 4).

and it is our position, as already set forth in our opening brief, that the Territory must first establish jurisdiction over the person of this appellant before its tax laws can be imposed upon him.

In the *Yerian* case, plaintiff was employed by the Home Owner's Loan Corporation, and resided in the Territory of Hawaii.

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[6] See same case, 35 Haw. 855, 859, stipulated facts no. 5.

Like any other resident of the Territory of Hawaii, he had, beyond the question of a doubt, subjected his person to the jurisdiction of the Territory.

The status of civilians living and working on military bases within territories of the United States has been the subject of much discussion and much interpretation. It seems to have been variously ruled upon and is usually determined by the Organic Act of the Territory involved.

Attention should be called to the following section of the Organic Act for the Territory of Hawaii:

> "No person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy *or by reason of being attached to troops in the service of the United States.*"
>
> (Underlining added—48 U.S.C.A. Sec. 619.)

Civilians employed by the federal government and living and working on military reservations in the Territory of Hawaii should be considered to come within the above classes of persons.

Appellant respectfully urges that the facts that he is domiciled in and a citizen of the State of Colorado; that he has paid a net income tax to the State of Colorado on the same income sought to be taxed herein by the Territory of Hawaii; and that he lives and works on a military reservation are points of difference between the instant case and the *Yerian* case and that they are material.

It must follow that in the levying of taxes upon incomes from trades, professions or employment, that jurisdiction over the person must be established before the tax can be considered applicable. If this were not so, then Congress

need not have included such a qualification in the Buck Act.

III.

THE TERRITORY OF HAWAII DOES NOT HAVE THE POWER TO IMPOSE THE TAX IN QUESTION ON THIS PARTICULAR APPELLANT.

A. THE FEDERAL STATUTES DO NOT GRANT THIS POWER.

Appellant cannot resist pointing out that the argument of appellee is in the last analysis mutually inconsistent.

On the one hand it is argued that the power to impose the tax in question is beyond dispute under the Public Salary Tax and Buck Acts, and on the other, that it has such power even in the absence of these federal statutes.

If such is the case the arguments of appellee under each heading must of necessity cancel each other out.

Before plunging into an analysis of the cases urged by appellee in support of its contentions a further consideration of the cases most heavily relied upon by appellee is in order.

In connection with the *Yerian* case, it should be kept in mind, that by maintaining a residence in the Territory of Hawaii, Yerian subjected himself to the jurisdiction of the Territory, and came within the general rule that is applied in such cases:

> "In our system of government the states have general dominion, and saving as restricted by particular provisions of the federal constitution, complete dominion over all persons, property and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons,

property and business, and in consequence have the power normally pertaining to government to resort to all reasonable forms of taxation in order to defray the government expenses."

Wood v. Tawes, 28 A. (2d) 850, 853.

And on page 854, the court continues:

"All these appellants, indeed, shared during the taxable year in the benefits of the expenditures by the state for the various activities of its government. As the trial judge pointed out, the public schools were available to their children; they had the benefit of police protection for themselves, their families and their property; they could use the public roads daily; the courts were open for resort by them if necessary; and so with every other benefit and privilege provided by the state or its agencies, such, for instance, as water supply and sewerage. They entered upon the enjoyment of these benefits, and should be liable to a share in the taxation levied to maintain them, in the absence of any distinguishing factor in their situation."

It must then become clear from a reading of this case and even the cases cited by appellee that there must be present some activity that places the person under the taxing jurisdiction of the state or territory in question.

Either his person, property or business transactions must come within the jurisdiction of the state or territory to make him subject to taxation.

In the *Yerian,*[7] *Wood,*[7] and *Rivera*[8] cases, it was the actual residence of the taxpayer that so subjected him.

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[7] Supra.

[8] *Rivera v. Buscaglia,* 146 F. (2d) 461.

In other cases cited by appellee it was the business activity, as will be pointed out more in detail below.

If this were not the case, incomes would be subject to triple taxation throughout the country.

It is respectfully submitted that, Congress, when it passed the Buck Act, did not intend to permit the unconscionable burden of triple taxation.

On the contrary, Congress insisted that domicile be established as a basis for income taxation in the District of Columbia Income Tax Law so that there would be no question of triple taxation (by Federal, State of domicile and the District of Columbia). In drafting this bill, it was said by Representative Bates:

> "We raised that particular point (in conference) because we are much concerned about how those who come from our states would be affected by the income tax provisions of the new laws, and it was distinctly understood that in this bill there should be no triple taxation . . ." 84 Cong. Rec. 8973.

In construing the provisions of the District of Columbia Income Tax Law, the Supreme Court has held that persons coming to the District of Columbia to work for the Federal government, even for an indefinite period of time, should not be subject to the tax if it be proved that a domicile elsewhere actually existed.

> "Did he pay taxes in the old community because of his retention of domicile which he could have avoided by giving it up? Were they nominal or substantial? In view of the legislative history showing that Congress was concerned lest there be 'triple taxation' — Federal, State and District (of Columbia)—the Board

should consider whether taxes similar in character to those laid by the Act have been paid elsewhere."

District of Columbia v. Murphy, 314 U.S. 441, 458.[9]

Appellant contends that federal employees would be reluctant to accept employment on military bases located within the geographical limits of states which levied heavy income taxes, which they must meet, together with similar taxes assessed by their domiciliary state, if triple taxation be mandatory.

Other states and territories might decide to levy taxes on the income of persons who merely entered their borders and conducted even a day's business or work. Government employees whose territory extended over large geographical areas inclusive of several states could be taxed by any state or territory through which they passed.

To permit such overlapping of taxation would result in the clashing of sovereignties — something to be avoided.

As Chief Justice Marshall well said:

"We have a principle which is safe for the states and safe for the union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to destroy what there is a right in another to preserve."

McCulloch v. Maryland, 17 U.S. 316.

It was to avoid the possibility of just such confusion and controversy that the matter of "jurisdiction" to tax was

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[9] Accord: *D. C. v. Pace,* 320 U.S. 698; followed:
Beedy v. District of Columbia, 126 F. (2d) 647.
Collier v. District of Columbia, 161 F. (2d) 649.
Beckham v. District of Columbia, 163 F. (2d) 701.

specifically referred to in the Public Salary Tax Act of 1939 and the Buck Act.

If carried to its ultimate end, the very basis of income taxation would be defeated and the taxing standards prove futile. It would open the way for retaliatory taxes *ad infinitum*.

These particular facts coupled with the factor that we are dealing with the power of a territory as distinguished from that of a state lead counsel to suggest that there is *no* case squarely in point with the instant appeal.

Appellee insists that the *Kiker*[10] case is precisely in point with the instant appeal.

This we answer by respectfully suggesting that the dissenting opinion represents the view more nearly correct and applicable to the case at bar.

Moreover, the tax there was not that of a state or territory, but that of a municipality. It is conceivable that the tax by a municipality would be allowed where the tax of a corresponding sovereign state would be disallowed, in that the question of domicile might not be as material to a municipal tax as it would in the case of a state or territory. For there the taxpayer would not be able to show he has paid an identical tax on the same governmental sphere or plane.

But even in the *Kiker* case the court went to great length to show some benefit to the taxpayer before permitting the tax.[11]

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[10] *Kiker v. City of Philadelphia,* 346 Pa. 624, 31 A. (2d) 289.

[11] "The reservation is immediately adjacent to Philadelphia . . . Plaintiff may at all times use the street, bridges and other facilities of the City and also has the benefit of its police and fire departments when engaging in business or pleasure in that municipality, as well as many other advantages. It is common knowledge that the City of Philadelphia cuts all ice, and

Furthermore, the area in question there was within a state, and not a territory, hence differing in type of sovereignty than in the instant case.

It is this very fact that in the instant case we have a taxpayer, domiciled in one state, paying taxes to this state, on the same income that is sought to be taxed herein that distinguishes our case, and raises a serious doubt as to the power of Congress to give its consent to taxation within federal areas and have that consent work in all cases. Not only is involved the taxing authority of the state or territory and the federal area, but also the sovereignty of the state of the domicile of the taxpayer which must be considered.

Appellee asserts that:

> "Jurisdiction to tax the income derived from services may be exercised by the state in which the employee is domiciled, or by the state in which he is employed, or both."
>
> (Appellee's brief, p. 4.)

A careful examination of the cases submitted by appellee in support of such contention shows that the cases cited do not actually stand for such a proposition.

Neither the *Yerian*[12] nor *Lawrence*[13] cases are authority for the dual incidence of taxation. In fact, the latter case supports the position of appellant in that:

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keeps the Delaware River navigable from the northern limits of the City to Chester, where in the winter months navigation would otherwise be closed, making possible to plaintiff the transportation he uses to go to and return from League Island to his home in New Jersey. This is decidedly a benefit to him." *Kiker v. City of Philadelphia,* 31 A. (2d) 289, 295.

[12] Supra.

[13] *Lawrence v. State Tax Commission,* 286 U.S. 276.

> ". . . domicile in itself establishes a basis for taxation." *Lawrence v. State Tax Commission,* 286 U.S. 276, 279.

The "dual taxing jurisdiction" that appellee refers to is based upon the particular facts of each case and the nature of the property sought to be taxed, and in each case there is a definite basis for the tax by each jurisdiction.[14]

The case of *Rivera v. Buscaglia*[15] is actually a case in support of the proposition appellant urges.

There the tax upon federal employees was upheld because of their "residence" on the island.

It is important to note that in the case of *Surplus Trading Co. v. Cook,* 281 U.S. 647 (Cited by appellee, Brief p. 7) the personal property within the military reservation was held not subject to the personal property tax levied by the State of Arkansas.

The *Dravo* and *Silas Mason* cases[16] were mainly concerned with public construction jobs on navigable rivers.

In the latter case it was held that the United States Reclamation Act was not intended to provide for the acquisition of exclusive jurisdiction, and further:

> ". . . the evidence is clear that the Federal Government contemplated the continued existence of state jurisdic-

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[14] Both *Graves v. Elliott* and *Curry v. McCanless,* cited by appellee in support of the double taxation argument, were based upon the peculiarities that exist upon death, where both the state of domicile and state where the intangibles are located were permitted to impose inheritance taxes. And in the *Guaranty Trust Co.* case also cited by appellee, the state of Virginia taxed the resident beneficiary because the income was received within its jurisdiction, while New York taxed the discretionary trust that was established and administered there.

[15] Supra.

[16] *James v. Dravo Contracting Co.,* 302 U.S. 134.
Silas Mason Co. v. Tax Commission, 302 U.S. 186.

> tion consistent with federal functions and invited the cooperation of the state in providing an appropriate exercise of local authority over the Territory."
>
> "School facilities were to be, and have been provided with the local authorities. Police protection was to be, and has been, assured by cooperation with the State patrol. Cognizance of crimes committed within the area has been taken by local prosecutors and judicial officers. It is futile to say that these local authorities became federal authorities *pro haec vice,* for the contracts which have been ratified by Congress manifestly contemplated action by the local officers as representatives of the State and acting in the exercise of state jurisdiction."
>
> *Silas Mason v. Tax Commission,* 302 U.S. 186, 208, 209.

The *Bowers v. Oklahoma Tax Commission* case concerned the imposition of a use tax, and it is respectfully submitted that there might well be a different jurisdictional base with respect to a use tax as compared with an income tax.

It can hardly seriously be contended that these cases are comparable to the case at bar.

It is possible in similar manner to dispose of other cases cited by appellee as being distinguishable from the case at bar on the facts indigenous to each.

B. THE POWER OF THE TERRITORY TO IMPOSE THE TAX IN QUESTION DOES NOT EXIST "EVEN IN THE ABSENCE OF SUCH STATUTES."

Appellee's second point of argument that the Territory had the power to impose the tax in question even in the absence of the Public Salary Tax Act and the Buck Act is

of course absurd on its face and ignores completely the fundamental problem raised by this appeal.

It is quite obvious that if Congress considered that the Territory had the power to impose the tax, in the absence of the act, the direct reference to territories would have been omitted from the Buck Act. Further, if Congress had desired the Buck Act to include all persons within the geographical limits of certain areas to be included in the act, the reference to "jurisdiction" would have been omitted also. Those facts are so apparent that they are almost too evident to mention.

The problem is not whether the territory has broad powers of taxation but simply whether appellant is subject to the jurisdiction of the territory. And if he is not so subject, then neither the Public Salary Tax Act, nor the Buck Act, nor any other congressional act, can render him subject to territorial taxation upon income taxed by his domiciliary state.

As between two conflicting taxing authorities every instinct of reason, justice and practicality urges that the taxing authority of the domiciliary state should prevail.

Appellee recites *Territory v. Carter,* 19 Haw. 198 and *Cassels v. Wilder,* 23 Haw. 61, and contends that since in these two cases, two members of the armed forces were subjected to the jurisdiction of the territory, one for criminal prosecution and the other assessed a tax on a privately owned automobile that these should be considered controlling. Appellant respectfully would like to point out that these should not be considered as controlling for in a later case, *West v. West,* 35 Haw. 461, the court emphatically states:

> "We think that both reason and authority support the following conclusions: (1) that an officer or enlisted man, when permitted to establish a home outside of his military or naval station, may thus acquire a domicile *but cannot acquire a domicile when required to reside in quarters furnished by the government on a military or naval station . . .*" (Emphasis added.)
>
> *West v. West,* 35 Haw. 461, 472.

Even more decisive is the case of *U. S. v. Motohara,* 4 U.S. Dist. Ct. Hawaii, in which the court states:

> "This phrase, 'within the exclusive jurisdiction of the United States' is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a state, or even within a Territory, over which the federal government has by cession, by agreement, or by reservation exclusive jurisdiction. These cases are tried by circuit or district courts of the United States, administering the laws of the United States, and not by the courts of the State or those of the Territory."
>
> 4 U.S. Dist. Ct. Haw. p. 65, 66, quoting from *Gon-Shay-EE,* petitioner, 130 U.S. 343, 352.

Appellee correctly concludes that "Enclaves[17] exist in the several states under and pursuant to Article I, Sec. 8, Cl. 17" (Appellee's brief p. 6) and under the above holding, it is respectfully urged that enclaves can also exist in territories.

In attempting to differentiate relative to the situation of military areas in territories as distinguished from those in

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[17] Webster's New International Dictionary, 2d ed. p. 842, defines "enclave" in its primary senses as "a tract or territory enclosed *within foreign territory.*" (Underlining added.)

the states and the District of Columbia, appellee relied on the Hawaii National Park Act of April 19, 1930, which reads as follows:

> "Sec. 1. That hereafter sole and exclusive jurisdiction shall be exercised by the United States over the territory which is now or may hereafter be included in the Hawaii National Park in the Territory of Hawaii, saving, however, to the Territory of Hawaii the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed outside of said park, and *saving further to the Territory of Hawaii the right to tax* persons and corporations, their franchises and property on the lands included in said park . . ." (Underlining added.)
>
> Appellee's Brief, p. 20, 21.

Appellant contends that if the right to tax were already inherent or established over federal areas previously or subsequently created, Congress would not feel the necessity of implicitly reserving the right of the Territory to tax persons or property in such federal area.

The question remains therefore for determination as to whether or not the military area in question is actually within the Territory of Hawaii, jurisdictionally speaking, and whether or not civilians domiciled on the mainland of the United States and living and working in this area are subject to the territorial income tax laws.

It is the contention of appellant, that simply by coming to live and work on a military reservation, a person domiciled in another state does not *ipso facto* become subject to the Territorial tax laws, and that he must place his per-

son or activity within the jurisdiction of the Territory, and in the words of the decision in the case of *Wood v. Tawes,* supra, 28 A. (2d) 850, 853:

> "Maintenance of a place of abode, however, must involve at least a sufficient residence within the state to bring the individual within the taxing jurisdiction, otherwise the exaction might amount to a deprivation in violation of the 14th Amendment of the United States Constitution."

CONCLUSION

For the reasons set forth in our opening and reply briefs, it is respectfully urged that the judgment and decision appealed from should be reversed.

Dated at Honolulu, T. H., this 1st day of February, 1949.

Respectfully submitted,

/s/ Hyman M. Greenstein

HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch,
Appellant.

Due service and receipt of 3 copies of the within reply brief is hereby acknowledged this 4th day of February, 1949.

/s/ Rhoda V. Lewis

Assistant Attorney General,
Territory of Hawaii,

Attorney for Appellee.